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DATO' AMBIGA SREENEVASAN & ORS

v.

MENTERI DALAM NEGERI & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[JUDICIAL REVIEW NO: R2-25-165-2011]
24 JULY 2012

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UNINCORPORATED ASSOCIATIONS: *Societies - Coalition for Clean and Fair Alection (BERSIH) - Application for judicial review of first respondent's decision to declare BERSIH as unlawful society - Whether BERSIH within definition of "society" in Societies Act 1966 - Whether decision in finding BERSIH unlawful tainted with irrationality*

D

- Whether impugned order liable to be quashed - Whether applicants' rights adversely affected by impugned order - Whether application to be allowed

ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari - Application for judicial review to declare BERSIH an unlawful society - Whether BERSIH society within definition of "society" in Societies Act 1966 - Whether decision in finding BERSIH unlawful tainted with irrationality - Whether impugned order liable to be quashed - Whether applicants' rights adversely affected by impugned order - Whether application to be allowed*

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This was an application by the applicants for judicial review of the decision by the first respondent, Menteri Dalam Negeri. The Honourable Minister had issued an order pursuant to s. 5(1) of the Societies Act 1966 ('the Act') declaring the 'Coalition for Clean and Fair Election' ('BERSIH') an unlawful society. The applicants were members of the steering committee of BERSIH 2.0 and were individuals from a number of non-governmental organisations ('NGOs'). BERSIH 2.0 planned to organise a rally on 9 July 2011. However, a week before the scheduled date, an order was issued to declare BERSIH an unlawful society. The said order was made on the ground that BERSIH was being used for purposes prejudicial to the interest of the security of Malaysia and public order. Notwithstanding the declaration order, BERSIH 2.0 organised the rally which proceeded as scheduled. In her affidavit, the first applicant affirmed that despite the order, she and the

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other applicants had never been complained of being part of an unlawful or illegal society, or as being a threat to national security nor public order. It was made clear by the said affidavit therefore, despite the development of BERSIH and its continuous activities, the Honourable Minister remained firm in declaring BERSIH as an unlawful society under s. 5 of the Act. The applicants are now challenging the decision of the Honourable minister on, *inter alia*, these grounds (i) it was an error of law and in excess of jurisdiction because BERSIH was not a society within the definition of "society" in the Societies Act 1966 ('the Act'); (ii) the merits of the Honourable Minister's decision was made without evidence; (iii) the failure to comply with the rules of natural justice and for breach of the rights guaranteed under the Federal Constitution to which the court should give a non-restrictive interpretation. The SFC maintained his objection on the locus of the applicants in this application and argued that the Minister is empowered under the Act to issue the impugned order. It was further submitted that the decision of the Minister was one made on grounds of public order and public security. In view of the fact that the Minister had exercised his discretion properly under the law, learned SFC reminded the court that it should be slow in interfering with such a decision.

Held (allowing the application):

(1) The definition of "society" under s. 2 of the Act includes "an association of seven or more persons ... whatever its nature or object whether temporary or permanent." The word "person" is defined under s. 3 of the Interpretation Acts 1948 and 1967 to include "body of persons, corporate or unincorporated." Applying that definition, the word "persons" in s. 2 included coalition of NGOs. Thus, BERSIH 2.0 was an association or society within the definition of "society" under s. 2 of the Act. Since BERSIH was caught by this definition, it was therefore within the power of the Minister to declare it unlawful under s. 5. (paras 19 & 23-24)

(2) The date the impugned order was made was 1 July 2011. Thereafter, these events took place (a) there were negotiations between the applicants and the respondents as to the location of BERSIH rally on 9 July 2011; (b) there was an audience given by His Majesty DYMM to the first

applicant relating to the planned rally; and (c) BERSIH 2.0 rally took place without censure as scheduled. No action was taken against the applicants under the provisions of the Act applicable to unlawful society. BERSIH, the unlawful society under s. 5, was uncharacteristically allowed to carry out its activities like normal. The conduct of the respondents in dealing and handling BERSIH soon after it had been outlawed did not reflect BERSIH as an unlawful society. It did not reflect the conduct of persons who found the society to be used for purposes prejudicial to the interest of the security of Malaysia and public order. (paras 30-31 & 34)

(2a) The decision to outlaw BERSIH impinged on the rights guaranteed under the Federal Constitution and should not be taken in a lackadaisical manner. It was difficult to reconcile how a society found to be used for purposes of threatening public security on 1 July 2011 could be allowed to organise a peaceful assembly on 9 July 2011. The decision to declare BERSIH unlawful therefore was questionable. Thus, the decision in finding BERSIH unlawful was tainted with irrationality. Having analysed the background against which the impugned order was made in its entirety, the impugned order was liable to be quashed on this ground. (paras 32, 38 & 41)

(3) The decision by the respondent was a legal decision made under the Act and applicants' rights were adversely affected by the impugned order. The applicants were also liable to criminal prosecution under the Act. Being adversely affected, there was no reason to deny them the remedy sought. (para 52)

Case(s) referred to:

Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Associated Provincial Pictures House v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Council of Civil Service Unions v. Minister For the Civil Service [1984] 3 All ER 935 ***(refd)***

Damansara Jaya Sdn Bhd v. Penghuni-Penghuni Kuil Muneswaran Alayam atau Kuil Muniandy Maha Kali Alayam [1994] 1 CLJ 164 HC ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri & Lagi [2010] 1 CLJ 300 FC ***(refd)***
Datuk Musa Aman & Ors v. Tan Sri Chong Kah Kiat [2010] 6 CLJ 134 CA ***(refd)***
Edwards v. Bairstow [1956] AC 14 ***(refd)***
Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***
Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***
Lee Eng Teh & Ors v. Teh Thiang Seong & Anor [1966] 1 LNS 79 HC ***(refd)***
Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(refd)***
Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***
Ong Boon Hua @ Chin Peng & Anor v. Kerajaan Malaysia [2010] 3 CLJ 125 HC ***(refd)***
PP v. Chew Choon Ming & Ors [1987] 1 LNS 35 HC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
R v. L and Another [2008] EWCA Crim 1970 ***(refd)***
Re Application Of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
SPH De Silva Ltd v. Balwant Singh [1960] 1 LNS 121 HC ***(refd)***
Tan Eng Hoe v. Liang Hooi Kiang [1960] 1 LNS 135 HC ***(refd)***
Tharmalingam v. Sambathan [1960] 1 LNS 144 HC ***(refd)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132 SC ***(refd)***

Legislation referred to:
Interpretation Act 1948 & 1967, s. 3
Federal Constitution, art. 10
Rules of the High Court 1980, O. 15 r. 12(1), O. 53 rr. 2(4), 6
Societies Act 1966, ss. 2, 5(1), (2), 9(c), 17, 41(1)(a), (b), (c), (d), 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

For the applicants - Tommy Thomas (Honey Tan Lay Ean & K Shanmuga with him); M/s Azzat & Izzat
For the respondents - Azizan Hj Arshad (Shamsul Bolhassan & Munahyza Mustafa with him) SFCs; AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf J:

[1] This was an application by the applicants for judicial review of the decision by the first respondent Menteri Dalam Negeri. The Honourable Minister issued an order pursuant to s. 5(1) of the Societies Act 1966 *vide* gazette no. [PU(A) 224/2011], declaring "the Coalition for Clean and Fair Election" ('BERSIH') an unlawful society. The applicants now challenge the order seeking for the following reliefs:

i. An order of *certiorari* to remove the Order dated 1.7.2011 made under section 5 of the Societies Act 1966 [P.U.(A) 224 / 2011] by the First Respondent declaring the "Coalition for Clean and Fair Elections (BERSIH)" movement as an unlawful society (the Order) into the High Court to be quashed forthwith.

ii. Further and/or in the alternative, a Declaration that the Order is null and void and of no effect.

iii. An order of prohibition directed to the First and Second Respondents and each of them prohibiting the said First and Second Respondents and each of them and by their respective servants, officers, agents and all persons acting under their respective control and direction from:

(a) Entering all or any of the premises of the Applicants ad each of them, and/or

(b) Searching all or any of the premises of the Applicants and each of them, and/or

(c) Seizing and/or detaining all or any property belonging to the Applicants and each of them, except with the leave of this court.

iv. An order of mandamus directed to the First and/or Second Respondent to compel the said First and/or Second Respondents and each of them to release to the Applicants all T-shirts, placards, newspapers, books, circulars, pictorial representations, accounts, banners, lists of members, seals, insignia, arms or any other document or writing or other object whatsoever bearing the logo and words BERSIH 2.0 belonging to the Applicants and each of them which have been seized.

v. Provision be made as to the costs of this application. A

vi. Such further or other relief as this Honourable Court considers just.

[2] At leave stage, learned Senior Federal Counsel ('SFC') on behalf of the Attorney General raised objection on *locus* of the B applicants. However, leave was granted by this court on 28 September 2011. It was granted only in respect of prayers (i) and (ii) above.

Brief Facts C

[3] The brief facts leading to the application are these. The applicants which constituted of 14 persons are members of the steering committee of BERSIH 2.0. They are individuals from a number of non-governmental organisations ('NGOs') amongst D others are the National Human Rights Society ('HAKAM'), Suara Rakyat Malaysia ('SUARAM'), Islamic Renaissance Front ('IRF'), Jamaah Islah Malaysia ('JIM'), Kuala Lumpur and Selangor Chinese Assembly Hall, Pusat KOMAS, Persatuan Aliran Kesadaran Negara, Persatuan Kesedaran Komuniti Selangor E ('Empower') and LLG Cultural Development Centre. The applicants launched BERSIH 2.0 on 10 November 2010. The steering committee was chaired by the first applicant Dato' Ambiga Sreenevasan who deposed the supporting affidavit on behalf of all the applicants. F

[4] It was deposed in her affidavit that prior to the 2008 General Election a coalition named themselves BERSIH was launched on 23 November 2006. According to the applicants BERSIH 2.0 differs from BERSIH that was launched before the G general election.

[5] BERSIH 2.0 planned to organise a rally on 9 July 2011. However about a week before the scheduled date, on 1 July 2011 the Honourable Minister issued an order to declare BERSIH as an unlawful society pursuant to s. 5(1) of the Societies Act 1966 H ('the Act'). The said order is made on the ground that BERSIH "is being used for purposes prejudicial to the interest of the Security of Malaysia and public order". The Order of the Minister is reproduced below:

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Societies Act 1966

Order Under Section 5

WHEREAS I am of the opinion and being satisfied that the Coalition for Clean and Fair Election (BERSIH) movement is being used for purposes prejudicial to the interest of the Security of Malaysia and public order:

NOW THEREFORE in exercise of the powers conferred by subsection 5(1) of the Societies Act 1966 [Act 335], I hereby declare that the said Coalition for Clean and fair Election (BERSIH) movement as an unlawful society.

Made 1 July 2011

[PPM. Pent. (S) 06.98; PN (PU2)196/IV]

DATO' SERI HISHAMMUDDIN BIN TUN HUSSEIN
Minister of Home Affairs

[6] Further to that it was also splashed in the main and electronic media that BERSIH 2.0 has been moving actively and was creating a situation of unrest and worry among the community; spreading propaganda to incite the people for the purpose of toppling the Government by distributing certain brochures; and giving the country a bad image through its activities which could also threaten public order, security, economic prosperity, sovereignty and harmony among the races.

[7] Notwithstanding the declaration order BERSIH 2.0 organised the rally which proceeded as scheduled. The rally took place on the scheduled date on 9 July 2011 and was participated by a large group of people. It was given a wide media coverage.

[8] In her affidavit, Dato' Ambiga affirmed that despite the order she and the applicants had never been complained of being part of an unlawful or illegal society, or as being a threat to national security nor public order. Neither do the official of the respondents ever raise issue of her being part of BERSIH 2.0 as an unlawful society or a threat to national security.

[9] The applicants assert in the affidavit that they are not subjected to the impugned order because the applicants represented BERSIH 2.0 and not BERSIH. In response the Honourable Minister in his affidavit in encl. 12 clarified that the order is applicable to BERSIH 2.0 (see para. 11). He explained the reason for such is because:

(i) BERSIH 2.0 also refers to the coalition for free and fair election as BERSIH before;

(ii) The purpose of BERSIH 2.0 is to continue the process of renewal/reform (Pembaharuan) of free and fair elections just as championed by BERSIH;

(iii) Even though the members of BERSIH 2.0 are said to be only from civil society organisations and without political parties involvement but there still remain the involvement of political parties in the activities sponsored by them such as the Assembly (referring to exhs. HTH1 and HTH3).

[10] In coming to his decision to outlaw BERSIH the Minister deposed in his affidavit (in encl. 12) that he had taken into account matters elucidated in paras. 9.1. Essentially he found evidence that the assembly planned by BERSIH 2.0 on 9 July 2012 would threaten peace and security of the nation because:

i. BERSIH had been used by Socialist Party of Malaysia (evidenced by the fact that it was in possession of brochures relating to BERSIH) for purposes prejudicial to security and public order of Malaysia;

ii. there were societies who voiced their worries if the assembly was to be held;

iii. political parties had encouraged attendance to the rally, the rally would incite peace and public order as shown in the reaction of members of public who lodged police reports (some of which are shown in exh. HTH3);

iv. the assembly would prejudice economic activities of traders, taxi drivers as shown in 21 police reports lodged (shown in exh. HTH4);

v. another 1706 police reports lodged throughout the country showing that BERSIH was being used to prejudice the interest of Malaysia's security and public order.

[11] Pending the hearing of this judicial review application, the applicants filed an application in encl. 8. Enclosure 8 is an application made pursuant to O. 53 r. 6 of the RHC for an order of discovery and to cross-examine the respondents on their respective affidavits. Enclosure 8 was fixed for hearing on

21 March 2012. At or around that time, it was again splashed in the newspaper and electronic media that another rally was planned, this time by BERSIH 3.0. The Honourable Minister made public statement to allow BERSIH 3.0 to proceed with the proposed rally of 28 April 2012 subject to terms imposed.

[12] Taking judicial notice of the development, at the hearing of encl. 8, I made an order for the first respondent to clarify the position taken by him in view of his permissive approach towards the rally proposed by BERSIH 3.0, *vis-a-vis* the position taken in declaring BERSIH as an unlawful society. By this time it was clear that there exist BERSIH, BERSIH 2.0 and BERSIH 3.0.

[13] In response the Minister explained in his affidavit in encl. 10 maintaining his firm stand on declaring BERSIH an unlawful society. He clarified the reason for him taking a permissive stand on the proposed BERSIH 3.0 rally was due to the coming into force of the new Peaceful Assembly Act 2012. Part of the Honourable Minister's affidavit in response is reproduced below:

> 3. Saya telah dinasihatkan oleh Peguam Kanan Persekutuan bahawa Yang Arif Hakim Mahkamah Tinggi telah pada 25 April 2012 mengarahkan saya selaku Responden Pertama memperjelaskan pendirian Responden-Responden mengenai Gabungan Pilihanraya Bersih dan Adil (BERSIH) berikutan daripada kenyataan-kenyataan saya yang dilaporkan di media-massa tempatan bahawa saya membenarkan rancangan perhimpunan BERSIH 3.0 selagi perhimpunan tersebut diadakan secara aman dan pihak-pihak perlu bertanggungjawab ke atas tindakan masing-masing.
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> 4. Saya sesungguhnya percaya dan ingin menegaskan bahawa kenyataan saya sepertimana dilaporkan itu tidak sama sekali menyentuh atau bertentangan dengan pendirian Responden-responden mengenai ketidaksahan BERSIH yang telah pun diputuskan oleh saya pada 1 Julai 2011 di bawah seksyen 5 Akta Pertubuhan 1966 sebagai satu pertubuhan yang menyalahi undang-undang. Pengisytiharan BERSIH sebagai satu pertubuhan yang menyalahi undang-undang melalui Warta Kerajaan Persekutuan P.U.(A) 224/2011 bertarikh 1 Julai 2012 masih lagi berkuatkuasa sehingga kini.
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> 5. Saya sesungguhnya menyatakan bahawa kenyataan-kenyataan saya di media-massa itu dibuat selaras dengan kewujudan Akta Perhimpunan Aman 2012 [Akta 736] yang telah diluluskan oleh Parlimen dan mula berkuatkuasa pada

> 23 April 2012. Akta 736 ini antara lain membenarkan semua warganegara mempunyai hak untuk menganjurkan perhimpunan atau untuk menyertai perhimpunan secara aman dan tanpa senjata dan hak untuk menganjurkan perhimpunan atau untuk menyertai perhimpunan secara aman dan tanpa senjata, tertakluk kapada sekatan-sekatan yang didapati perlu atau suaimanfaat dalam suatu masyarakat demokrasi demi kepentingan keselamatan Persekutuan atau mana-mana bahagiannya atau ketenteraman awam, termasuk perlindungan hak dan kebebasan orang lain. Berikutan daripada penguatkuasaan Akta 736 tersebut, mana-mana orang yang berhasrat untuk membuat perhimpunan aman, bolehlah berbuat demikain dengan berpandukan tatacara-tatacara di bawah Akta 736 tersebut.

[14] It was made clear by this affidavit therefore, despite the development of BERSIH and its continuous activities the Honourable Minister remained firm in declaring BERSIH an unlawful society under s. 5 of the Act.

Grounds Of Challenge By The Applicants

[15] The applicants is now challenging the decision of the Honourable Minister on the grounds stated below. Learned counsel for the applicants Encik Tommy Thomas (Cik Honey Tan Lay Ean and Encik K Shanmuga with him) advanced the arguments to challenge the Minister's decision on the grounds that:

(i) it is an error of law and in excess of jurisdiction because BERSIH is not a society within the definition of "society" in the Societies Act, since its component also constitute companies registered under the Companies Act 1965;

(ii) BERSIH is not a society within the meaning defined under the Act because the Minister described BERSIH as a movement and not a grouping or a society;

(iii) the Minister has no power to declare BERSIH unlawful because; it is a coalition of organisations and not persons, which the Societies Act does not intend to cover;

(iv) the merits of the Honourable Minister's decision was challenged for being made without evidence to support his conclusion that BERSIH is a threat to public security or public order of Malaysia relying on *Darma Suria Risman Saleh v. Menteri Dalam Negeri & Malaysia & Ors* [2010] 1 CLJ 300.

(v) the failure to comply with the rules of natural justice and for breach of the rights guaranteed under the Federal Constitution which the court should give a non restrictive interpretation, relying on *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507.

[16] Learned SFC maintained his objection on the locus of the Applicants in this application. He also argued that the Minister is empowered under the Societies Act 1966 to issue the impugned order, which the Minister had properly exercised. It was further submitted that the decision of the Minister is one made on the grounds of public order and public security supported by evidence before him. He had taken into account all the relevant facts to come to his decision as shown in his affidavit. In view of the fact that the Minister had exercised his discretion properly under the law which was premised on ground of public security, learned SFC reminded the court to be slow in interfering with such a decision. He cited in authorities the cases of; *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 to contend that the Minister's absolute discretion cannot be challenged. The case of *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81, to support the argument that the Minister is the sole judge on what is national security, the case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, which held that the executive by virtue of its responsibilities, has to be the sole judge of what national security requires (see also *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132, *Re Application Of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126, and *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300.)

Minister's Power Under The Act

[17] I will first deal with the relevant provision of the Act under which the impugned order is made. Under s. 5 of the Act the Minister is empowered to declare unlawful any society or branch or class or description of any societies which in his opinion is or is being used for purposes prejudicial to, or incompatible with the interest of the securities of Malaysia.

[18] The word "society" is defined in s. 2 of the Societies Act 1966 as follows: A

> "Society" includes any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent, but does not include - B
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> (a) any company registered under the provision of any written law relating to the companies for the time being in force in Malaysia;
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> (b) any company or association constituted under any write law; C
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> (c) any trade union registered or required to be registered under the provisions of any written law relating to trade unions for the time being in force in Malaysia;
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> (d) any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof; D
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> (e) any co-operative society, registered as such, under any written law; E
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> (f) any organization or association in respect of which there is for the time being in force a certificate (which may be granted, refused or cancelled at his discretion) by a person or authority appointed under the provisions of the written law for the time being in force relating to the registration of schools that such organization or association forms part of the curriculum of a school; or F
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> (g) any school, management committee of a school, parents' association or parent-teachers' association registered or exempted from registration under any law for the time being in force regulating schools; G

[19] It was the applicants' contention that BERSIH constitutes a coalition of various organisations and represented by the applicants to form a steering committee and therefore is not an association of persons as envisaged by the Societies Act 1966. If we examine the definition of "society" under s. 2 of the Act, it includes an association of seven or more persons ... whatever its nature or object whether temporary or permanent". From the applicants' own submission BERSIH fall into the category of a coalition of seven or more persons, but they are not all natural H I

persons. There is no definition of "persons" under the Societies Act 1966 and such, the definition found in the Interpretation Act 1948 and 1967 (Act 388) applies. The word "person" is defined under s. 3 of the Interpretation Acts 1948 to include "body of persons, corporate or unincorporated". Applying that definition, the word "persons" in s. 2 of the Societies Act will include coalition of NGOs including companies incorporated under the Companies Act 1965. Thus eventhough BERSIH is an association of unnatural persons it would still fall within the definition of "society" under s. 2 of the Act.

[20] It is true that the definition of society excludes all the bodies listed in (a) to (g) including companies, trade union, co-operative society, organisations from under written law, school management and other authorities. The rationale for the exclusion of three bodies from the definitions of "society" and hence excluded from the application of the Act is not difficult to grasp. It is because all these bodies are already regulated by the respective laws under which they are constituted. It would then be superfluous to regulate them under the Societies Act 1966. The fact that company is excluded from the definition of society as listed out in paras (a) to (g) under s. 2 above in my view is quite immaterial. When one of these bodies form a coalition with other bodies it would create another entity differs from its members. Hence even if BERSIH constitute companies and other bodies it is an association of persons distinct from its component and cannot be excluded by virtue of clause (a) to (g) in the definition under s. 2 of the Societies Act 1966 as shown above.

[21] The word association in s. 2 has also drawn some discussions. In the *Burton's Legal Thesaurus* (third edition) the word coalition connotes:

> affiliation, alliance, amalgamation, association, binding, bond, cartel, combination, combine, coming together, community, concurrence, confluence, conglomerate, congress, conjoining, conjunction, conjunction, conjuncture, connection, consociation, consolidation, consortium, conspirator, convergence, cooperation, federation, fellowship, fusing, fusion, fusion of interest, group, integration, interlocking joint concern, joint endeavour, junction, league, meeting, merging, mixture, mutual concern, partnership, society, sodality, syndicate, unification, union, union of factions, unity

Words and Phrase permanent Edition (Volume 7A), the word "coalition" is defined as follows: A

> Coalition is defined in general by Standard Dictionary as meaning a voluntary joining of persons or parties, for the purpose of combining their resources as, in support of some plan or policy, especially of states against a common enemy; the formation of an alliance, especially for temporary purposes. B

[22] From the above definition it can be concluded that there is no real difference between the word association and coalition of persons. The argument propounded by the applicants that the C Minister found BERSIH to be a "movement" in his order and therefore not an "association" as used in the definition of "society" under the Societies Act 1966 does not make a sensible proposition. In my view these words do not differ in meanings but are mere semantic. In any case, it is also the applicants' D submission that they are unincorporated persons for purpose of having the necessary locus in this application. They cannot in the same breath argue that they are not an "association of persons" for purpose of s. 2 of the Act.

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[23] Having regards to all the above provisions, to my mind the Coalition for Free and Fair Elections known as BERSIH 2.0 is an association or society within the definition of "society" under s. 2 of the Act. BERSIH 2.0 exists as a society under the Act though it is not a registered society. Since BERSIH is caught by this F definition it is therefore within the power of the Minister to declare it unlawful under s. 5.

[24] Under s. 5 the Minister has an absolute discretion to order any society or branch or class of society used for purpose prejudicial or incompatible with the interest of the security of G Malaysia, or for public order or morality, to be an unlawful society. In exercise of this power the Minister therefore has the authority to outlaw BERSIH despite it not being a registered society, because BERSIH by definition is a society within the meaning of the Act. H

Legal Implications On A Society Declared Unlawful

[25] There are various legal implications under the Act on a society declared unlawful. Upon publication in the gazette of the I Order made under s. 5(1), two implications are clearly spelled out in s. 5(2). They are these; firstly the order shall operate to cancel

immediately the registration of a registered society under the Act. This does not apply to BERSIH since it is not a registered society. Secondly, the society declared unlawful under s. 5(1) should be denied registration under the Act. This would apply to BERSIH but it is a not an issue before the court, because BERSIH never applied to be registered.

[26] There are also other implications on a society declared unlawful under the Act. Section 17, spells out in its title as follows:

> Consequence of order of the Minister under section 5, refusal of the Registrar to register a local society under section 7 and cancellation of registration of a registered society under any provision of this Act

Following s. 17, BERSIH would suffer the consequences listed out thereunder which essentially deal with the assets of a society upon it being outlawed under s. 5.

[27] Further to that s. 41 deals specifically with an unlawful society. Under this provision four categories of unlawful society are stipulated:

(a) A society or a branch thereof which has been declared unlawful by the Minister under s. 5;

(b) A society or a branch thereof which is not registered under s. 7;

(c) A branch of a registered society, where the branch was established in contravention of the proviso to sub-s. 12(3);

(d) A society or a branch thereof which has had its registration cancelled under ss. 2A, 13, 14 or 16.

[28] BERSIH 2.0 comes under s. 41(1)(a) since it has been declared unlawful under s. 5 of the Act. There is a whole list of provisions applicable to an unlawful society enumerated under s. 42 to s. 51. Quite clearly provided are punitive provisions to be imposed on office bearers, and persons who act as member, person who knowingly allows a meeting of lawful society, persons who incite another to be member of an unlawful society, person who procures subscription or aid of an unlawful society etc. All these provisions illustrate the serious legal implications of a declaration as an unlawful society. The penal provisions carry with them heavy penalties, and or custodial sentences.

[29] Returning to the facts of the present case, it was averred by the first applicant in her affidavit that after BERSIH 2.0 is declared unlawful by the Minister on the grounds that the movement is being used for purposes prejudicial to the interest of the security of Malaysia and public order, neither she nor the other members of the steering committee has been reprimanded for participating in an unlawful society.

[30] Far from being punished under the various provisions of the Act, it was deposed in the affidavit of the applicants that, the following ensuing events took place immediately after the said declaration was made. To appreciate this better we will start with the date of the impugned order of 1 July 2011. After the order was made, His Majesty DYMM YDPA Tuanku Mirzan Zainal Abidin ibni Al Marhum Sultan Mahmud Al Mukti Billah Shah, out of concern for the securities of the nation made a call for all parties to resolve the planned BERSIH rally. Thereafter the following events took place:

(a) there were negotiations between the applicants and the respondent as to the location of BERSIH rally of 9 July 2011 as shown in exh. AS8;

(b) there was an audience given by His Majesty DYMM to the first applicant as the chairman of steering committee of BERSIH 2.0 on 5 July 2011 relating to the planned rally;

(c) BERSIH 2.0 rally took place without censure, as scheduled on 9 July 2011

[31] From all accounts, it is clear that no action had been taken against the applicants under the earlier provisions of the Act applicable to unlawful society which I had earlier alluded to. Conversely, BERSIH the unlawful society under s. 5, was in fact uncharacteristically allowed to carry out its activities like normal. Eventually it held the peaceful assembly planned, right after it was declared unlawful.

[32] Whilst it can be argued that the prerogative to act against unlawful society or otherwise remains with the respondents, it must be borne in mind that an order made under s. 5 of the Act impinges upon the right and liberty of an individual, guaranteed under the Federal Constitution, in particular the right to assembly in art. 10. The respondent cannot therefore treat the order in a cavalier manner on one hand, saying that BERSIH is an unlawful

society because it has been used for purposes prejudicial to the interest of the Security of Malaysia as well as public order on 1 July 2011, and on the other hand allowed its planned rally to be carried out eight days later on 9 July 2011. It is difficult to reconcile how a society found to be used by a political party for purposes threatening public security on 1 July 2011 can be allowed to organise a peaceful assembly on 9 July 2011.

[33] Instead of being subjected to the various provisions under the Act in tandem with the pronouncement of it as unlawful, the opposite happened. Right after the declaration by the Minister, the Steering Committee Chairman was given a royal audience by YDPA on 5 July 2011 to discuss the planned rally. BERSIH was in fact at the table of negotiation with the respondent's representative right after the said order, trying to resolve on how and where the planned rally should be held. Let us not forget that at that material time no peaceful assembly could have been held without the permit of the police under the Police Act 1967. These whole episode brought into question as what is the meaning of an unlawful society *viz*; can an unlawful society which is prejudicial to public order and public security be given permit to organise a peaceful assembly; if no permit is granted, how does one explain the big rally that took place on 9 July 2011 without any legal hindrance; is the public therefore put under threat to public order and security by such an unlawful assembly organised by an unlawful society; Finally, how does unlawful society which threaten public order and security be allowed to carry on as normal.

[34] In the upshot the conduct of the respondents in dealing and handling BERSIH soon after it was being outlawed in fact do not reflect BERSIH as an unlawful society, but it connotes something else. It does not at all reflect the conduct of persons who found the society to be used for the "purposes prejudicial to the interest of the Security of Malaysia and public order." Issue of public security is a serious one and BERSIH after been declared to be unlawful for such reason cannot be treated in such a light manner.

[35] In raising the above questions, I am mindful that in reviewing an administrative decision I must look at how a decision has been arrived at, from the perspective of what were the facts and evidence before the Minister at the time the decision was made, as well as the decision making process. However, the facts of the present case is built upon an ongoing episodes and it is all so intertwined that it would be ridiculous to ignore the

development without looking at the facts and events in its entirety. Besides being so intertwined as it were, the assembly or rally that took place which occurred almost instantaneously after BERSIH was declared unlawful, is too glaring and difficult to be ignored. After all, the facts that were taken into account by the Honourable Minister in issuing the order centred on the planned rally of 9 July 2011. It was against this planned rally that almost 2000 police reports were lodged; the brochures relating to this rally were found to be in possession of the Socialist Party of Malaysia which was part of the reason why the Minister concluded that BERSIH was used for purpose detrimental to the security of the nation.

[36] The reason of public security for issuing a declaration under s. 5 cannot change within days. It cannot be a case that a society is a threat to public security on 1 July 2011 and then no longer so, soon after that. The respondent cannot be blowing hot and cold at the same time. However if the reason of public security had since ceased then the declaration should be lifted accordingly.

[37] The decision to outlaw BERSIH impinges on the rights guaranteed under the Federal Constitution and should not be taken in just a lackadaisical manner. If BERSIH is found to be a threat to the security of the nation, the conduct of the respondents in treating BERSIH certainly does not reflect such. In my view two things could have happened which brought upon this situation;

(i) either BERSIH was initially found to be a threat to public order and security, then a week later it was no longer a threat; or

(ii) the decision to declare BERSIH unlawful, was made without taking into account some relevant facts or by taking into account some irrelevant facts.

[38] In either case the decision to declare BERSIH unlawful becomes questionable. It is for this reason, I hold the view that the decision in finding BERSIH unlawful is tainted with irrationality, in the sense of *Council of Civil Service Unions v. Minister For the Civil Service* [1984] 3 All ER 935 referring to the concept of Wednesbury Unreasonableness in *Associated Provincial Pictures House v. Wednesbury Corporation* [1948] 1 KB 223.

[39] This concept was referred to by Malaysian case in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159. In that case this concept was explained and classified into two main categories;

> (a) comprehensive unreasonableness ie, where a person entrusted with a discretion who must properly direct himself in law fails to call to his attention matters which he is bound to hear and conclude from his consideration irrelevant matters; and
>
> (b) unreasonableness with reference to a decision which no reasonable body of persons could have made.

[40] The decision in Council of Civil Service Unions Minister For the Civil Service was accepted by the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where Edgar Joseph Jr FCJ quoted the following remark by Lord Diplock:

> By "irrationally" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

[41] The ground of irrationality has been accepted as a ground to quash an administrative decision. As stated by Lord Diplock the ground of irrationality need no longer be justified by resorting to Viscount Radeliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, by ascribing it to an inferred indefinable mistake of law by a decision maker. It is now accepted as a ground on its own on which a decision may be attacked by judicial review. Having analysed the background against which the impugned order is made in its entirety, it is my considered view that the impugned order is liable to be quashed on this ground.

Locus

[42] I now come to the issue on locus. Learned SFC had raised objection on locus of the applicants at leave stage. I however had dismissed the objection at leave stage and had allowed leave in respect of the first two prayers in this application.

[43] At the hearing on merits of this application, the same issue of locus was again brought up. In raising the *locus* issue learned SFC put forward an argument that the applicants do not have locus because a society can only sue and be sued pursuant to s. 9(c) of the Act. Since BERSIH is not a registered society it has no legal standing though it exists as an entity. In aid of his submissions the cases of *PP v. Chew Choon Ming & Ors* [1987] 1 LNS 35, *Ong Boon Hua @ Chin Peng & Anor v. Kerajaan Malaysia* [2010] 3 CLJ 125 and *Datuk Musa Aman & Ors v. Tan Sri Chong Kah Kiat* [2010] 6 CLJ 134, were cited as authorities.

[44] Learned counsel for the applicants contended that BERSIH is an unincorporated association and it is recognised in common law. Various cases were cited to support the contention by the applicants on the existence of unincorporated association. Referring to *R v. L and Another* [2008] EWCA Crim 1970, the Court of Appeal held that:

> There are probably almost as many different types of unincorporated association as there are forms of human activity. But the legal description "unincorporated association" applies equally to any collection of individuals linked by agreement into a group. Some may be solid and permanent; other may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association, but so are a number of learned societies with large fixed assets and detailed constitutional structures. So too is a fishing association and trade union. And partnership, of which there are hundreds of thousands, some very large indeed, is a particular type unincorporated association, where the object of the association is the carrying on of business with a view to profit.
>
> At common law, an unincorporated association is to be distinguished from a corporation, which has legal personality separate from those who have formed it, or who manage it or belong to it ... At common law, as the judge succinctly held, an unincorporated association has no legal identity separate from its members. It is simply a group of individuals linked together by contract. By contrast, the corporation, of whatever type, is a legal person separate from the natural persons connected with it.

[45] The existence of unincorporated associations and other entities existing outside the ambit of the Societies Act 1966 and therefore not registered there under, has long been recognised in Malaysia. In this regard, there is clear case law that indicates the existence of such entities both prior and subsequent to the

A enactment of the Societies Act 1966. (See *SPH De Silva Ltd v. Balwant Singh* [1960] 1 LNS 121, *Tan Eng Hoe v. Liang Hooi Kiang* [1960] 1 LNS 135, *Tharmalingam v. Sambathan* [1960] 1 LNS 144, *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1966] 1 LNS 79 and *Damansara Jaya Sdn Bhd v. Penghuni-Penghuni Kuil*
B *Muneswaran Alayam atau Kuil Muniandy Maha Kali Alayam* [1994] 1 CLJ 164).

[46] The applicants in this application are steering committee members of BERSIH 2.0. Leave was granted on an inter parte
C basis where an overall assessment of facts were made available at the hearing. There is no other ground separate and distinct to negate the applicant's substantive locus. No appeal was taken by the respondent on the leave granted by this court. The argument by the SFC now to deny locus on the same ground is therefore
D circuitous.

[47] There is no issue of the applicants not being adversely affected by the impugned decision here. The issue on locus is raised on the lack of entity of the applicants. BERSIH 2.0 is an
E association of more than seven persons and hence falls within the meaning of "society" under the Act which empowers the Minister to declare it unlawful. The applicants are the steering committee members of BERSIH 2.0. In this regards the case of *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363, the Court
F of Appeal is a good guidance. It was found by the Court of Appeal in that case that the committee members of a society are persons adversely affected by the decision and should be allowed to seek reliefs for judicial review.

[48] In that case the committee members of the Malaysian
G Taekwondo Association ('MTA'), an unregistered society filed an application for judicial review and one of the objections raised was on the locus of such applicants. It was raised by learned SFC in Chi Mee Keong that the applicants therein do not have locus as they are not authorised persons to sue for and on behalf of MTA
H and they do not constitute the full quorum of the committee members. The Court of Appeal *inter alia* held that an association cannot sue in its own name but should commence an action by its registered public officer. Since MTA is not a registered society then it is permissible for any office bearer of the association to
I mount a claim for and on behalf of its members.

[49] The Court of Appeal found that this is also permitted under O. 15 r. 12(1) of the RHC. The applicants in Chi Mee Keong were office bearers of the MTA and they sued in their own names as committee members of the MTA. This meant that they were representing the members of the MTA by virtue of them being elected by the latter to such position. In fact the Court of Appeal went on further to state that, although only six out of ten committee members brought this action, it was immaterial as even a single member could represent other members. In the same light, in my view the applicants here are all members of the steering committee representing BERSIH and should be clothed with the necessary locus to make this application.

[50] James Foong CJA (as he then was) deliberating on issue of locus under O. 53 r. 2(4) of RHC in that case stressed that "... under O. 53 r. 2(4) of the RHC there is no restriction on the capacity of the person making an application for judicial review except that he must be adversely affected by the decision of the public authority who made the decision under review."

[51] The test of "adversely affected" person under O. 53 r. 2 RHC was decided in the latest decision of the Federal Court in *Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805. The Federal Court observed in the above case that the findings of the Royal Commission of Enquiry were not legal decision within the ambit of O. 53 r. 2(4). Since there was no legal decision, it follows that the legal rights of the subjects are not affected by that decision to entitle them to a judicial review. In that way the applicants in the said case was found by the Federal Court to be "person not adversely affected" to qualify them to any remedy under O. 53 of the RHC.

[52] In the present case, the decision by the respondent is a legal decision made under the Act and applicants' rights are adversely affected by the impugned order. The applicants are also liable to criminal prosecution under the Act. Being adversely affected, there is no reason to deny them the remedy sought.

[53] Premised on all the above reasons I hereby allow the application of the applicants in prayer (1) of encl. 1. In view of the public interest issue involved in this application, I make no order as to costs.